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No. 89-252

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1989

BARRY WARREN CLYDE,

, Petitioner,

vs.

THE STATE OF NEVADA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

On November 7, 1986, two confidential informants reported to the Washoe County Consolidated Narcotics Unit about a meeting with Karen Dawson to arrange for the purchase of two kilograms of cocaine. A DEA agent, acting in an undercover role, made contact with Ms. Dawson to complete the two kilogram cocaine transaction for

sixty-six thousand ($66,000) dollars. Ms. Dawson initially indicated that her source of cocaine, Barry Clyde, was expected to deliver the drugs from San Francisco.

Introduced into evidence was a list of phone calls from Ms. Dawson to Barry Clyde (hereinafter "Defendant"). (Record on Appeal: Vol. X, pp. 142, 153; State's Exhibits "A," "B-1" and "B-2").

On November 14, 1986 the undercover agent secured rooms at the Hyatt Hotel/Casino in Incline Village, Nevada for Ms. Dawson. She kept one room. (ROA: Vol. VI, p. 148; Vol. X, pp. 79-80).

Officers of the Consolidated Narcotics Unit (hereinafter referred to as CNU) observed the Defendant to arrive at the Hyatt Hotel carrying a tan case from his car. A trained drug sniffing dog responded positively to the interior of Defendant's car. (ROA: Vol. VII, pp. 190-191; 193-194).

Defendant's conversation with Mr. Paul Kolbus, was overheard by undercover officers who heard Paul Kolbus state that the transaction should go very fast. (ROA: Vol. VII, pp. 252, 253, 287).

Ms. Dawson brought a kilo of cocaine to the undercover officers from her room. Ms. Dawson was placed under arrest and other officers entered her hotel room, where they located and arrested Paul Kolbus, Robert McCollister and Defendant. Another kilogram of cocaine was found in this room, as well as cocaine powder residue and short straw on a table. (ROA: Vol. VI, pp. 147, 151-152, 154; Vol. VII, pp. 154, 159-161; 291-296).

An officer testified that he observed Defendant near the window of the room and that he appeared to have just thrown something out the window. A second officer testified that he observed Defendant at the window throwing out a plastic item

containing a white powder. (ROA: Vol. VII, pp. 240, 244-245, 256, 284-285).

Another officer testified that cocaine residue was found on the floor of the room near the window. The person in the immediate area of the residue on the floor and nearest the window was Defendant. Still another officer testified that he found cocaine residue in plastic bags located directly below the window of the room near Defendant. (ROA: Vol. VII, pp. 256, 259-260).

A search of the room revealed an envelope marked "Clyde and Associates," a kilo of cocaine and a plate with Defendant's fingerprints. (ROA: Vol. IX, pp. 519-582; Vol. VII, pp. 298, 302, 315-319; State's Exhibit "EE").

All four of the individuals were arrested and charged with numerous drug charges including Conspiracy to Sell a Controlled Substance and numerous counts of

Trafficking in a Controlled Substance. Three of the four pled guilty to felony Trafficking.

At arrest, Defendant was given Miranda rights and informed of Nevada's Trafficking statutes; which he signed.

The State's only offer to all four co-defendants would require a guilty plea to Count II, Trafficking in a Controlled Substance. Defendant's counsel was advised that it was a decision between him and his client as to whether or not they would apply for or comply with the substantial assistance provisions of NRS 453.3405(2). (ROA: Vol. III, pp. 284-285).

Co-defendant Karen Dawson provided a statement concerning all four individuals' involvement in the crime. She identified Defendant as the source of the two kilos of cocaine.

Ms. Dawson claimed that she was going to provide substantial assistance; in fact,

she did not. She was sentenced, without benefit of substantial assistance, to 15 years in prison and find $250,000. (ROA: Vol. III, pp. 285).

Co-defendant Kolbus provided a statement to law enforcement officers outlining the involvement of Defendant as the source of the cocaine. (ROA: Vol. III, pp. 397; Vol. II, pp. 544, 554, 560-562, 586, 589-590, 599-600, 616). He provided names and locations for other drug dealers and he made phone calls for law enforcement. Defendant Kolbus pled guilty to trafficking and testified at Defendant's trial. The State argued against a substantial assistance finding for Mr. Kolbus, but the Court found otherwise. Defendant Kolbus was sentenced, with benefit of substantial assistance, to eight years in prison. (ROA: Vol. II, p. 621).

After defense attorney inquiry, it was indicated that the provision of other drug

dealers' names would be the best indication of compliance with the substantial assistance statute at sentencing. Defendant was advised, in the presence of counsel, that he could go to trial and pursue any appropriate choices during the proceedings against him.

On November 24, 1986, after Defendant Kolbus had given his statement to DEA and CNU, Defendant, his counsel, and CNU officers met. Said entire taped pre-conviction discussion was transcribed and attached as an Appendix to the Petition. It was Defendant's position that he could provide major quantities of drugs (100-500 kilos) and major drug dealers, even from foreign countries. (Pet. App. 4, 14). However, it became clear to the experienced CNU officers that Defendant was playing a game. There being no facts offered, there was no way to establish the credibility, honesty or trustworthiness of Defendant.

CNU wanted to confirm Defendant's veracity because, among other reasons, they might have to place their lives on the line based on Defendant's veracity. (Pet. App. 7, 9). Defendant was trying to give the appearance of cooperation while, in fact, giving no information (nothing) whatsoever.

The officers told Defendant:

> "...if you feel if you got a good chance for a shot of beating this case in this Nevada Supreme Court then maybe you ought to take a shot at that..." (Pet. App. 6).
> "...go ahead and take your shot in court on this case, if you're acquitted, and you truly mean what you're saying about helping, then you'll come in and do the right thing." (Pet. App. 11).

Defendant would not commit to providing substantial assistance or information if he were acquitted of his charges. (Pet. App. 12).

Defendant was later told:

> "...If you want to maintain your constitutional principles so far as having a jury and going through the

nine years, have at it; that's you right..." (Pet. App. 13).

"...And once you make the bail and if you want to come back and talk with us and cooperate at that time, that's fine." (Pet. App. 19).

At the end of the meeting, Defendant was again advised to resolve his current case and

"...resolve that first and once that's been resolved, and if you still have that ambition and those feelings, which I don't think you will anyhow, we'll talk about it." (Pet. App. 20).

No information or assistance was provided at the interview, after Defendant was out on bail or after his conviction. Nothing since that time has been provided by Defendant to any law enforcement officer. During the 44 days between Defendant's conviction and sentencing, Defendant neither provided nor offered to provide any information whatsoever. The best that can be said of Defendant is that he offered to work undercover as a drug

purchaser, assuming the officers set up the deal. (Pet. App. 14, 17). It is for that reason alone, the State submits, that Defendant was granted a finding of substantial assistance over the State's objection.

Co-defendant McCollister pled and was sentenced for one felony count of trafficking in a controlled substance.

Defendant's statement to Parole and Probation (pre-sentence) consisted of the following:

> "I attempted to cooperate with law enforcement shortly after my arrest in November of 1986. In a taped interview, I told the police that although I did not know where the two kilos came from that were in the room I was invited to, I had been introduced to a guy in Monterey that I was told was a smuggler. I indicated I would be happy to help law enforcement to set up some deal. I was refused because the officers only wanted to know about this particular deal...." (ROA: Vol. XII).

This statement of Defendant is not true. Defendant mentioned 'California' in

his statement, not 'Monterey.' Nowhere in his statement did Defendant ever tell officers that he did not know where the two (2) kilos of cocaine came from. He would not talk about his case at all.

Co-defendant Dawson made her statement to law enforcement officers, which implicated Defendant. (ROA: Vol. III, p. 785; Vol. VI, pp. 100-113). Co-defendant Kolbus testified that Defendant was involved as the source of the drugs and named him as a co-conspirator, accomplice, accessory and principal. (ROA: Vol. VIII, p. 397; Vol. II, pp. 544, 554, 560-562, 586, 589-590, 599-600, 616, 621).

During the trial, a juror, Mrs. Caldwell, expressed concern, if not displeasure, with regards to the tactics of counsel for Defendant. That is, the juror did not understand that there would be numerous objections, after most were overruled, and hearing interruptions

(outside the presence of the jury). She stated often that she did not understand these aspects of judicial procedure. (ROA: Vol. XI, p. 282). She characterized the problem, in her own testimony, as follows:

> It was the continuing interruption is not what I normally thought a procedure went. If this is the normal type procedure, then this is something for me to learn and understand and assimilate into the general information. I'm not aware of the normal court procedures....I wasn't familiar with it happening as repetitiously as it happened, yes, I guess that's probably bothered me....No, no, not just your objecting, per se. You have a right to. If you were my lawyer I would want you to do everything within your power to do whatever it is you have to do as a lawyer. No, I don't -- it's not the procedure like that. It's just -- I just did not know what the norm is....Just what I said earlier, the constant interruptions the constant -- everybody being out of the room and not knowing what we're supposed to be doing. (ROA: Vol. XI, pp. 282, 284-286).

All statements she made were with regards to the trial procedure, as opposed to any opinion on the case itself. Ms.

Caldwell specifically indicated to the Court that she had been paying full attention, and that she was being open minded. On at least five separate occasions she indicated that she was keeping an open mind. (ROA: Vol. XI, pp. 281-284).

It is accurate that she once indicated that she held an opinion. However, it's clear from the testimony and dialog that this opinion was with regards to the trial procedure and counsel tactics and not an opinion regarding guilt or innocence of Defendant. The Court appropriately admonished her and specifically inquired whether she would follow the admonitions. She clearly answered in the affirmative. (ROA: Vol. XI, p. 289).

When the bailiff was sworn with regards to the statement she made to him by juror Caldwell, he stated that she felt that the constant objections by defense counsel were

causing an animosity towards counsel. She characterized it as "...like a fish flopping on a deck beating a dead horse." (ROA: Vol. XI, p. 290). At no time did the juror ever state that she held an opinion on the guilt or innocence of Defendant - never.

The Court's dialog with her was as follows:

THE COURT: What can you tell us right now about your opinions or lack-of opinions with respect to this case?" (ROA: Vol. VII, p. 355).

MS. CALDWELL: At this point in time I'm just listening to all the evidence and weighing it all. I resolved the problem of the constant going out and going out, because I didn't understand that, but you explained it quite adequately.

THE COURT: Okay. Thank you.

MS. CALDWELL: I'm not having any problems at this time.

THE COURT: Is there any ill feeling or are you attributing anything at all that's going on this case negatively towards any party?

MS. CALDWELL: No.

THE COURT: We have explained to you, then, that although we apologize for the interruptions, that they are to be considered as normal. You have accepted that?

MS. CALDWELL: I have accepted that, yes, your honor. (ROA: Vol. VII, p. 355).

Thereafter, counsel for Defendant asked her no further questions when given the opportunity. (ROA: Vol. VII, p. 356).

ARGUMENT

Petitioner alleges that NRS 453.3405 is impermissibly vague because it contains no explicit standards for controlling its application by law enforcement. The simple

response to this allegation is that this is, in fact, not true. The statute is not applied by law enforcement in any manner whatsoever; it is a sentencing statute for a trial judge, after an evidentiary hearing. The hearing may be requested by either the State or Defendant. It is a post-conviction remedy for sentencing by the Court.

In this very case Defendant's pre-trial interview was tape recorded; said tape was available as evidence for the substantial assistance hearing. The statute gives no authority, power, or authorization to law enforcement in any manner whatsoever.

The Statute Is Not Void For Vagueness

The Nevada Supreme Court applied its definition of the Void For Vagueness doctrine from **Sheriff v. Lugman**, 101 Nev. 149, 697 P.2d 107 (1985) (quoting **Connally v. General Construction Company**, 296 U.S.

385 (1926).

> A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process.

Defendants cited authority are distinguishable as cases wherein law enforcement was granted arresting authority based upon their statutory interpretation. In **Papachristou v. City of Jacksonville**, 405 U.S. 156 (1972) a vagrancy statute discretion was given police. In **Grayned v. City of Rockford**, 408 U.S. 104 (1972) the police could arrest for their interpretation of an ordinance prohibiting picketing (anti-noise). Finally, in **Smith v. Goguen**, 415 U.S. 566 (1973), police determired what was contemptuous treatment of the U.S. flag. The Void for Vagueness doctrine is described as one which:

> ...requires legislatures to set

> reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent arbitrary and discriminatory enforcement of criminal statutes. **Smith, supra**, at p. 574.

There was no arbitrary and/or discriminatory police enforcement of a statute in this case.

Inasmuch as men of common intelligence need not guess at the meaning of an evidentiary hearing, nor differ as to its application as both the defendant and the state may bring the hearing and evidence, the statute is not unconstitutionally vague and/or ambiguous.

The Statute Does Not Violate Defendant's Fifth or Sixth Amendment Rights

The statute applies in a post-conviction proceeding only, even if the evidence presented is post-arrest or pre-trial. There can exist no violation of the Fifth Amendment privilege against self-incrimination when an adjudication of guilt

and conviction is a condition precedent to an NRS 453.3405 hearing. Equal protection allegations are satisfied as the Defendant, whether convicted by plea or trial, may invoke the statute and bring forth all evidence of his information and assistance and that of any police refusals.

The facts reveal no refusal, by officers, of the statutory benefit to Defendant. A transcript review establishes that Defendant's alleged offer to cooperate was a farce and a sham.

Nothing prevented Defendant from cooperating further after conviction, to earn greater statutory benefits than those given by the Court. The Court's finding of substantial assistance by Defendant negates his allegations.

The Nevada Supreme Court has previously upheld the procedure of informing a defendant of the provisions of the statute against the allegation that the statute

coerces incriminating statements from defendants. **Sanchez v. State**, 103 Nev. 166, 734 P.2d 726 (1987).

This identical statutory procedure was upheld in **Roberts v. United States**, 445 U.S. 552, 63 L.Ed.2d 622, 100 S.Ct. 1358 (1980).

The due process argument is belied by an evidentiary hearing, which Defendant can originate. Evidence will be received of Defendant's actions, activities or proffer of assistance.

It is not unreasonable to assume the existence of factual situations wherein the defendant must provide pre-trial or pre-conviction information in order to gain the statutory benefits due to the secretive, quick, and deadly nature of the drug business. Explaining the statute simply informs one of existing rights and available actions. Their options are then fully known.

Law enforcement's refusal of defendant's offer of assistance or information can be brought out at the evidentiary hearing by witnesses or tapes, etc.

The Florida Supreme Court has addressed an identical statute (from which Nevada took its statute). In **State v. Benitez**, 395 So.2d 514 (S.Ct. Florida 1981), the Florida Supreme Court concluded that the substantial assistance statute does not coerce a defendant into relinquishing the Fifth Amendment privilege by denying him sentencing leniency unless he cooperates with the authorities. The Court stated at pp. 519-520:

> ...We reject this argument, ...nothing in the statute suggests that 'substantial assistance' must incriminate the defendant of crimes other than those for which he has already been convicted (and for which no Fifth Amendment privilege is obviously necessary). ...nonetheless, a defendant need not invoke Subsection (3), as nothing in a

> statute is compulsive. Putting a defendant through a difficult choice is not necessarily forbidden by the Fifth Amendment. See e.g., **Corbitt v. New Jersey**, 439 U.S. 212, 99 S.Ct. 492, 58 L.Ed.2d 466 (1978). ...**Bordenkircher v. Hayes**, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978); **McGuatha v. California**, 402 U.S. 183, 91 S.Ct. 1454, 28 L.Ed.2d 711 (1971). No constitutional deprivation results if a defendant elects to reap the benefits of Subsection (3).

Other states have held substantial assistance statutes to be constitutional. See **State v. Willis**, 300 S.E.2d 420 (N.C.App. 1983); **Wheatt v. State**, 410 So.2d 479 (Ala.Cr.App. 1982); **State v. LaCompte**, 406 So.2d 1300 (S.Ct.La. 1980).

Juror Bias Did Not Occur

Defendant has misconstrued the evidence and statements of the juror. Defendant argues that the juror admits to forming an opinion as to Defendant's guilt. This is not true and no such statements can be found in the evidence.

The juror did form an opinion that had to do with the constant objections of defendant's counsel (trial tactics). The juror indicated often that she was being open minded. She indicated that she would follow the court's admonitions. Therefore, the State submits that defendant's characterization of the juror's opinion applying to guilt or innocence in this case is not factually supported, not appropriate, and not reasonable given the evidence. The juror specifically testified to no ill feeling or anything being attributed negatively towards any party in the matter.

Defendant's argument is refuted by the juror's testimony. It is clear that her comment about 'beating a dead horse' was specifically addressed to the tactics of defense counsel and the trial interruptions. The evidence established, beyond all doubt, that the juror kept an

open mind and was abiding by her oath.

In **Erwin v. Dowd**, 36 U.S. 17, 81 S.Ct. 1639, 6th L.Ed.2d 751 (1961) this Honorable Court stated as follows:

> "The affirmative of the issue is upon the challenger. Unless he shows the actual existence of such an opinion in the mind of the juror as will raise the presumption of impartiality...if a positive and decided opinion has been formed, he would have been incompetent even though it had not been expressed."

In this case, it is obvious that no actual existence of the juror's opinion on the ultimate issue has been proven. What the evidence does establish is an opinion with regards to the procedure, court policy and the method of interruption of trial exhibited by defense counsel.

In **Kaplan v. State**, 96 Nev. 798, 618 P.2d 354 (1980), the Nevada Supreme Court adopted the standard cited in **Murphy v. Florida**, 421 U.S. 794 (1975) regarding juror impartiality. This standard

correctly applied herein, holds that it is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Defendant improperly inputs the juror's language to apply to Defendant's guilt when none was ever so stated, cannot be found in the record, and was not even clarified by Defendant's trial counsel, who had an opportunity to question the juror further and declined to do so.

CONCLUSION

It is respectfully submitted that Defendant's position that Nevada's substantial assistance statute gives discretionary authority to law enforcement regarding Defendant's assistance is totally contrary to the purpose and language of the statute itself, as the statute is a post-conviction election or option given to Defendant and enforced as a sentencing statute by the trial judge.

The State suggests that all conceivable factual scenarios, as alleged by Defendant, would be addressed at the evidentiary hearing by the trial judge. An appropriate determination would be made thereon, based upon the evidence produced by both parties.

Defendant received the benefit of Nevada's statute, over the objection of the state, and yet offered no information, assistance, or any form of cooperation with law enforcement from the date of his pre-trial interview through the date of his conviction and even to this very filing date. The statute clearly authorized Defendant to cooperate and provide substantial assistance after his conviction and prior to sentencing. Defendant elected not to take benefit of that provision and elected not to provide any information, assistance or cooperation with law enforcement subsequent to his conviction and prior to sentencing. Defendant has

not, to date, provided any information or assistance. Defendant was not truthful to his parole and probation officer regarding his drug information and knowledge.

Finally, the State suggests that the characterization of the juror's opinion as applying to Defendant's guilt is totally contrary to the evidence, the facts, and is contradicted explicitly by the record.

WHEREFORE, it is respectfully submitted that the Petition for Writ of Certiorari should be denied or dismissed.

Respectfully submitted,

MILLS LANE
District Attorney

By Larry G. Sage
LARRY GUY SAGE
Deputy District Attorney

CERTIFICATE OF MAILING

Pursuant to SCR 28, I certify that I am a member of the Bar of the Supreme Court of the United States. That on this date, I deposited for mailing in the U.S. Mails, with first class postage fully prepaid, a true and correct copy of the foregoing Brief in Opposition, in an envelope addressed to the following:

John J. Momot, Esq.
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Further, I state that all parties to be served have been served on this date, by mailing, in the manner described herein.

DATED this 22nd day of September, 1989.

Larry G. Sage

LARRY GUY SAGE
Deputy District Attorney